



# STATE MINING AND GEOLOGY BOARD

DEPARTMENT OF CONSERVATION

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[www.conservation.ca.gov/smgb](http://www.conservation.ca.gov/smgb)

## *Policy and Legislation Committee*

*Allen Jones, Chair; Erin Garner; Robert Tepel; Seena Hoose*



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## CONFORMED MINUTES

### THE POLICY AND LEGISLATION COMMITTEE (Allen Jones, Chair; Erin Garner; Robert Tepel; Seena Hoose) OF THE STATE MINING AND GEOLOGY BOARD

**DRAFT**

Conducted a Meeting on:

Thursday, July 12, 2007  
9:00 A. M.

Westin Horton Plaza Hotel  
The Plaza Room  
910 Broadway Circle  
San Diego, CA 92101

## AGENDA

For questions regarding this Agenda, please contact the SMGB office by telephone at (916) 322-1082, or by facsimile at (916) 445-0738. This Notice and associated staff reports can be accessed electronically at the SMGB's Internet web site at: <http://www.consrv.ca.gov/smgb/> (note: Agenda reports should be available electronically approximately one week prior to the scheduled meeting/hearing date).

The SMGB requests that all lengthy comments be submitted in writing in advance of the meeting date. To ensure that the SMGB has the opportunity to fully preview written material, comments should be received in the SMGB office no later than 15 days prior to the scheduled meeting date, and must indicate the Agenda Item to which it relates. For written material in excess of two pages, or that contains large maps, photos, foldouts, or other documents requiring special handling, please submit 12 copies. The SMGB will not reproduce these types of documents. Comments on Agenda Items will be accepted by electronic mail, and are subject to the same conditions set forth for other written submissions.

Individuals are responsible for presenting their own projects at the meeting.

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**[NOTE:** Times are approximate. The chairman may alter the hearing start time or agenda item order during the meeting.

**I. Call to Order (Jones)**

**II. Roll Call and Declaration of a Quorum**

The meeting was called to order at 9:00 A. M. All committee members were present at the time of roll call and a quorum was declared.

**III. Consent Items [Action]**

[All the items appearing under this section will be acted upon by the committee by one motion and without discussion; however, any committee member wishing to discuss a particular item may request the Chairman to remove the item from the Consent Calendar and consider it separately under Continued Business or New Business]

1. Approval of Minutes, June 14, 2007, Committee Meeting.  
Committee Member Tepel moved to approve the Minutes. Committee Member Jones seconded and the motion carried with a unanimous voice vote.

**IV. Continued Business [Action]**

2. Continued Discussion of the State Mining and Geology Board's (SMGB) Role in Conducting Vested Rights Determination Hearings as a Lead Agency under the Surface Mining and Reclamation Act of 1975 (SMARA).

Executive Officer Testa provided a brief synopsis of past actions and activities and indicated that at the June 14, 2007 meeting, the Committee received a revised version of the proposed preliminary language for the administrative procedure to conduct a vested rights determination when the SMGB serves as a lead agency under SMARA. Following review and discussion by the Committee members and interested parties, all comments on this matter were forwarded to the SMGB's legal counsel, Mr. Bill Cunningham, for his review and consideration. A revised version based on Cunningham's consideration of those comments was provided as part of the SMGB's packet. Following distribution of the SMGB's packet, additional comments were received by State Geologist John Parrish and Committee Member Tepel. Those comments were considered and the proposed preliminary language was again revised and copies were distributed at the meeting and made available to the public.

- Mr. Theodore Franklin, an attorney with Weinberg, Rogers and Rosenberg, representing Calvert and the Yuba Goldfields Access Coalition, stated that he appreciated the efforts made since February of this year by the SMGB and its legal counsel in providing a preliminary version of the draft regulations, and is looking forward to getting this matter moving forward. Mr. Franklin expressed a few comments, notably, he was frustrated that the opportunity for cross-examination was not included, but appreciated the language that was added which allowed for more flexibility and additional witnesses and rebuttals, if appropriate. It was Mr. Franklin's opinion that the procedure will be good overall, and will incorporate a little creativity, allowing the SMGB to do a better job, proceed more smoothly, and take less time. In regards to issues of law, Mr. Franklin expressed two points: first, the first sentence is



an overstatement and should be corrected to reflect what the statute actually states and he believed that the Committee's legal counsel, Mr. Cunningham, would agree. The sentence ends early and reads "A "vested right" is the right to conduct a legal non-conforming use of real property if that right existed lawfully before a zoning or other land use restriction became effective and the use is not in conformity with that restriction when it continues thereafter" and should read from the statute itself including "as long as the vested right continues and as long as no substantial changes are made in the operation except in accordance with this chapter." The definitive language should be read. Two conditions were presented 1976: 1) the matter of continuance which implied ways an operation could be discontinuous, and 2) the condition that no substantial changes are made except in accordance with SMARA. This is important because it is these very issues that will be largely contested and discussed.

Mr. Franklin's second point pertained to the definition of vested rights, and the language presents a section of a sentence that has been placed but which is not the definition of vested rights. Expansion of surface mining operations "may" be recognized as a vested non-conforming use under the doctrine of "diminishing assets" is unclear, since the word "may" suggests that it may not. The word "expansion" is problematic since the Hanson case did not endorse this term, and states that it is not deemed expansion if it is an intensification of use, and that this is acceptable. When stating the law, its better to refer to intensification of use. The Hanson case also speaks about natural increase of production and presumably impermissible removal of quantities of rock that exceed the amount of aggregate produced over the past years. A clarification may be considered here. In summary, the SMGB's adoption of the statute in the first sentence is highly recommended, and as for the second point, there may be need to be further debate on this matter at a later date.

- Mr. Shapiro, representing Western Aggregates, stated that he also wishes for this matter to move forward. Mr. Shapiro stated that he received the current version the previous Friday, and a number of problems were still not addressed. Although he wishes for this process to move quickly, we all will need to live with the administrative procedure once it is established, and he did not wish to sacrifice time over substance. Although the Committee, at its previous meeting, requested that any revisions be distributed at least 10 days prior to the next meeting, there was not adequate time to review the latest version. Mr. Shapiro stated that a number of issues were not addressed and without explanation, it is difficult to articulate again what these issues were and why changes were not made. Shapiro also stated that it was unfortunate that for two months now the drafter of the preliminary proposed regulations was not present.

Mr. Shapiro also expressed concern about the notice and due process accorded to the vested rights claimant, and the delegation of authority. In regards to the due process to a vested rights claimant, the section on "Vested Rights Hearing Procedure – Notice", the claimant can submit documents 10 days before the hearing, the public,



no less than 5 days before hearing. When the initial determination is submitted, it could be 2 pages or 5 boxes. From that point on, there are 2 to 3 months of time allowed for review, and then 10 days for the claimant to have another opportunity - then 5 days before the hearing any number of public members can submit any number of documents – that is 5 days to look at all the information. The public will have 3 to 4 months to review information submitted by the claimant; whereas, the claimant will not have opportunity to submit information in response. The burden of proof is on the claimant, and the claimant should have the final opportunity to rebut. The claimant has due process rights and the ability to respond to allegations that they do not have vested rights. Mr. Shapiro reminded the Committee that these issues were discussed last month. Direction was given from the Committee to its legal counsel to consider these concerns, but the language looked exactly the same as before. Mr. Shapiro indicated that a written response was forthcoming.

Second, the related issue also addresses the new language under “b” in red – The old language seems to give discretion to rebuttal testimony to others outside the claimant, but it is always the case that the claimant has the final say. Anything otherwise would be a violation of the vested rights due process, and there should always be an opportunity, at all times, for the claimant to have opportunity to rebut.

Discussion of the delegation of authority was held this past June, and Mr. Shapiro felt that the hearing officer should not have the final say. The SMGB has only limited authority to delegate authority and should not do so. This would be in bad policy. The whole idea was for the SMGB to develop regulations to avoid a lengthy process, and delegation of authority to a hearing officer sets up a bad process. The SMGB should have ability to overturn any decision of the hearing officer. Those are the two main issues of concern. A process with no explanation as to why comments were not accommodated is not recommended and though we wish to move this forward, and regrettable as it is, this matter needs to be done right and should be deferred until September.

- Committee Chairman Jones expressed his frustration with the non-availability of the Committee’s legal counsel as well. Chairman Jones stated that the Committee did have a response from its legal counsel, but that it is noted as “confidential, attorney-client privilege”, and thus, the Committee is not comfortable sharing these comments at this time.
- Mr. Shapiro expressed his opinion that such reasoning be shared, and that all comments provided by the interested parties were adequately considered.
- Mr. Adam Harper representing the California Construction and Industrial Materials Association (CalCIMA) concurred with Mr. Shapiro concerns, and would appreciate feedback to the public from the Committee. Mr. Harper stated that multiple issues appear to be left unresolved, as with the timeline already mentioned, the term “lapse” and a new term “waived”, and when Hanson mentions abandoned, with no clarification provided. It would be better if any decision by the Committee could be deferred until the September meeting, when the Committee has legal counsel



present to address the rationale in accepting some comments and not accepting others.

- Committee Member Tepel shared his frustration with absence of legal counsel, and suggested that this matter be moved forward and was open to having a meeting in August. If the SMGB uses a hearing officer, is the SMGB, upon receiving the hearing officer's report, empowered to accept or reject, whole or in part, any decision made by the hearing officer – if so, this is not clear in the current language. Member Tepel also expressed the need for a vested rights claimant to demonstrate that the operator (claimant) has exercised its surface mining operation with care, and is in "good standing" with no Notices of Violations, or Orders to Comply, has a current financial assurance, and has no liens or claims on the subject property where a vested rights determination play is being considered. Another concern is the cost to the SMGB, which could be substantial, and be of a magnitude that adversely imperils the SMGB in fulfilling the rest of its mission or in conducting further vested rights determinations. This regulation and administrative procedure will be used many times by many parties, and the SMGB should be appropriately compensated as with environmental studies and documents the SMGB is responsibly for preparing. Essentially, the operator pays the SMGB in advance, and then the determination commences. A determination could easily reach several hundreds of thousands of dollars.
- Deputy Director Jason Marshall provided a Department of Conservation (DOC) perspective, and discussed briefly how one would administer this determination process, and that it was a matter of reimbursement authority to conduct this work. If the SMGB is court-mandated to conduct this determination, a mechanism does exist for the SMGB to assess to the cost. How the SMGB invoices and pays for the services it requires is within its jurisdiction, and this is purely a budgeting matter and should be solvable within the DOC in the next fiscal year.
- Committee Member Hoose expected to see certain issues addressed, and was not clear whether they were done so adequately, such as the use of the terms "lapse" and "waive", the importance of explaining what the SMGB is not doing in conducting this determination, notification to other interested or impacted parties, and funding where two alternatives are provided when solely one should be, and why couldn't the SMGB do both in some reasonable manner. Additional work and consideration is deemed necessary. The notification process is left unclear with the term "adjacent landowner" and an opportunity for the public to participate needs to be addressed. In regards to vested rights procedures and notice, posting on the SMGB's website should be added, and in a newspaper with circulation in the area where the vested rights determination is located. Member Hoose also expressed the need for clarification within the section titled "Effect of Vested Rights Determination", pertaining to whether vested rights be waived, lapse or are otherwise abandoned. Clarification may need to be considered in regards to what other requirements may be appropriate, such as acquiring a permit to mine, and approved reclamation plan and financial assurance.
- Chairman Jones inquired from Executive Officer Testa as to what opportunities existed to incorporate new comments during the rulemaking process. Testa stated





that all comments received would have to be considered, and incorporated or not incorporated, with reason. Chairman Jones expressed the need to move this matter forward, but it was best to defer until legal counsel is available.

Committee Chairman Jones moved to incorporate Member Hoose's concerns into a larger, broader motion. Committee Member Tepel seconded and the motion carried with a unanimous voice vote.

Committee Member Hoose moved that the Committee return the document to the Deputy Attorney General for additional revision and modification, and that a revised version be made available at the next Committee meeting scheduled for September 13, 2007, and at such a time, the Committee could recommend to the whole SMGB to direct the Executive Officer to proceed with rulemaking. Committee Member Tepel seconded and the motion carried with a unanimous voice vote. Chairman Jones requested that the Committee's legal counsel carefully consider the comments of Mr. Franklin and Mr. Shapiro.

Committee Member Tepel moved to assure that cost reimbursement issue is considered and an adequate financial mechanism be addressed in the next revision. Committee Member Hoose seconded and the motion carried with a unanimous voice vote.

#### **IV. New Business [Action]**

No new business reported.

#### **V. Good of the Meeting [Information]**

[This time is scheduled to provide the public with an opportunity to address non-agenda items. Those wishing to speak should do so at this time. All persons wishing to address the Committee should fill out a speaker card and present it to the Secretary so that the Chair can determine the number of persons who wish to speak. Speakers are limited to three minutes except by special consent of the Chairman]

David Jones, representing Riverside County as Chief Engineering Geologist, introduced himself and indicated that although the County as a lead agency under SMARA is not under review by the SMGB and OMR, the County is working diligently at its SMARA program and look forward to working with the state as these programs continue. Chairman Jones expressed his appreciation of the County's positive and favorable attitude toward its SMARA program.

#### **VI. Announcements of Future Meetings**

The next meeting of the Committee is anticipated to be held in San Jose on September 13, 2007.



**VII. Adjournment**

The meeting was adjourned at 10:00 A.M.

**APPROVED**

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Allen Jones, Chairman

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Stephen M. Testa, Executive Officer

